United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL WITH PROOF OF SERVICE

76-1034

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

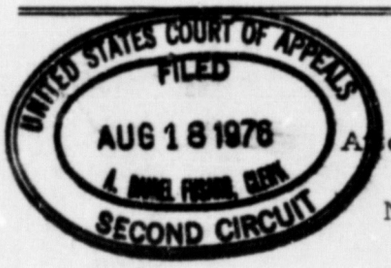
-against-

HARRY D. IACONETTI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

PETITION FOR REHEARING AND REHEARING EN BANC AND STAY OF THE ISSUANCE, OR RECALL OF MANDATE



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I N D E X

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

HARRY D. IACONETTI, :

Defendant-Appellant. :

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PETITION FOR REHEARING AND REHEARING EN BANC

and

FOR STAY OF THE ISSUANCE, OR RECALL OF MANDATE.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Appellant respectfully petitions this Court for a rehearing and rehearing en banc, inasmuch as the principles involved are of far reaching importance and likely to affect other persons similarly situated.

Appellant also prays for a stay of the issuance of the mandate, or its recall.

It is respectfully submitted that this Court was in error in rendering its opinion of affirmance on August 4, 1976.

This Court, in said opinion, clearly overlooked the basic principles applicable to hearsay evidence and misinterpreted, as did the trial Judge, the application of those provisions of the new Federal Rules of Evidence pertinent to the issues herein.

Also, the Court failed to give proper weight to the effect of the testimony of the Government's rebuttal witnesses on the jury's determination.

In addition, the Court failed to take proper cognizance of the effect of the Court's charge to the jury, which included the two counts of extortion under Title 18, Section 1951 U.S.C., which improperly influenced the jury's determinations on all five counts and adversely affected defendant's constitutional rights.

I. THE OPINION OF AFFIRMANCE IS IN ERROR.

Defendant's instant application is grounded upon the following:

1. This Court erred in its determination that the admission of the testimony of Goldman, one of the rebuttal witnesses -- Lioi's partner -- was proper under Rule 801(d)(2)(C) as defendant authorized the same;

2. The admission of the testimony of Stern was improper under Rule 803(24);

3. That defendant had adequate notice of the introduction of said rebuttal testimony; and

4. The trial Judge charged the jury on all five counts and later dismissed the two extortion counts. It cannot be denied that the crimes of bribery and extortion are almost similar and that this was highly prejudicial to defendant. It would be difficult to deny that it affected the jury's determination and was substantially prejudicial to defendant.

No consideration was given by this Court to Rule 802, Federal Rules of Evidence and to the preamble thereto which provides that the same should not be applied to work "injustice". Likewise overlooked was the fact that it was the trial Judge who first raised the matter of rebuttal evidence, absent any suggestion, request, offer or demand from the Government.

A.

This Court's opinion holding that defendant authorized Lioi to act as his agent which permits the introduction of Goldman's testimony under Rule 801(d)(2)(C) is erroneous. The aforesaid Rule is inapplicable to any "agency" since there can be no agency in a criminal situation, only a co-conspiracy. All of Goldman's testimony was highly prejudicial to defendant. Finally, he testified that he had never heard the tapes whereas Lioi testified that he had played the tapes for Goldman. Clearly, this basic contradiction does not qualify his testimony as an exception to the hearsay rule nor constitute a valid exception thereto.

B.

Stern's testimony -- held by this Court to be inadmissible under Rule 801(d)(2)(C) -- is likewise inadmissible under Rule 803(24) as an exception to the hearsay rule. In this case, this statutory exception has been stretched far beyond its limits to defendant's prejudice. The cases cited heretofore, United States v. Demasi, 445 F.2d 251, and United States v. Bennett, 409 F.2d 888, are applicable to demonstrate the impropriety of utilizing Rule 803(24) in this case.

C.

The trial Judge and this Court have refused to recognize that defendant did not receive timely notice of the introduction of said rebuttal testimony, as required by Rule 803(24).

As noted in the argument on this appeal, the Government had not made it known to defendant sufficiently in advance to provide defendant with a fair opportunity to prepare therefor. Likewise, no particulars were made known to defendant and these failures violate the safety factor provided in said Rule.

It must be noted that the Government gave no notice of its intention to introduce rebuttal testimony until October 17, 1975 -- on Friday afternoon -- only two days before the same was offered on Monday, October 20, 1975.

This Court's opinion that "defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony further militates against a finding that he was prejudiced by it" overlooks the fact that the trial Judge was pushing the trial to a conclusion and reluctantly granted a morning's continuance because

of a death in defendant's family. To claim that the intervening weekend was adequate notice to defendant is at war with the spirit and intent of the notice provision.

Other defendants may well be prejudiced by this determination. Defendant has been denied due process and the trial Court -- as well as this Court -- imposed an undue burden on defendant by the failure to give proper weight to the notice requirement.

D.

Charging the jury as to both the bribery and extortion counts was confusing to it and substantially prejudicial to defendant. If the extortion counts were dismissed prior thereto, defendant may well have been acquitted on the bribery counts. A reversal of the conviction on the bribery counts is proper on this ground.

II. APPLICATION FOR STAYING THE ISSUANCE OR RECALLING THE MANDATE.

Defendant intends to raise a number of certiorari issues as heretofore set forth. Defendant has received notice that he is to surrender August 30, 1976. Certainly, the Government cannot object to any request for adjourning said surrender

date while this motion is to be determined and while defendant appeals to the Supreme Court of the United States.

Defendant requests a further stay and continuance pending certiorari for which a petition will be timely filed.

Defendant is presently at liberty -- released on his own recognizance, without bail -- and requests a continuance of such status.

He has no prior criminal record. He resides with his wife, child and mother in Brooklyn. He is not a menace to the community nor was the crime on which he was convicted one of violence.

CONCLUSION

Appellant requests a rehearing and rehearing en banc and that the judgment of conviction be reversed.

Appellant also requests that the mandate be stayed or recalled.

This petition is made in good faith and not for purposes of delay and in the judgment of counsel, upon sufficient grounds.

Respectfully submitted,

LEON DICKER
Attorney for Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GRADY BENFORD, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 306 W. 94th #419 NYC 10025.

That on the 18 day of AUGUST, 1976, deponent personally served the within PETITION FOR REHEARING AND REHEARING EN BANC AND STAY OF THE ISSUANCE, OR RECALL OF MANDATE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER
UNITED STATES ATTORNEY FOR THE
EASTERN DISTRICT
ATTORNEY FOR PLAINTIFF-APPELLEE
225 CADMAN PLAZA EAST
BROOKLYN, N.Y.

Grady Benford

Sworn to before me this
18th day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977